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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 973

ESLER R. LANE, C. A. RICHMOND, F. A. GODDARD AND RALPH W. THOMAS, constituting the Creditors' Committee of Haytian Corporation of America,

Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and General Orders Involved 2

Statement 2

Specification of Errors to Be Urged 7

Reasons for Granting the Writ 8

Conclusion 12

Brief in Support of Petition 13

Argument:

POINT I—The functions of a statutory committee are not similar to those of a committee appointed under §44(b) in ordinary bankruptcy. The allowable expenses of a statutory committee should not be limited to those incurred by it in passing judgment on the plan and in making that judgment known to the debtor and creditors 13

POINT II—The services rendered prior to the Statutory Committee's appointment by persons who the Committee makes its agents and whose services are of value in the administration of the estate are properly compensable 20

Conclusion 23

TABLE OF CASES CITED:

PAGE

Matter of Credit Service, Inc., 31 F. Supp. 979..... 13

Securities & Exchange Commission v. *United States Realty & Improvement Company*, 310 U. S. 434.. 16

United States v. *Hutcheson*, decided Feb. 3, 1941, 85 L. Ed. 424..... 19

OTHER AUTHORITIES CITED:

Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347):
Section 240(a) 2

United States Bankruptcy Act, as amended:
Chapter X 16, 21
Section 167 21

Chapter XI 2, 8, 10, 15, 16, 17, 18, 21
Section 1(9) 15
Section 44(a) 8
Section 44(b) 7, 9, 10, 13, 14, 17
Section 62(c), (d) 9
Section 64(a) 1 9
Section 156 9
Section 168 9
Section 208 9
Section 242 9
Section 321 14
Section 322 3
Section 323 20
Section 332 15
Section 334 .....4, 22
Section 338 .....2, 4, 9, 10, 13, 14, 15, 19
Section 337(2) 2, 10, 15, 19, 22
Section 366(4) 18, 21
Section 366(5) 18

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Petitioners,

—against—

HAYTIAN CORPORATION OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals, for the Second Circuit, and Brief in Support Thereof.

Petitioners respectfully pray that a writ of certiorari issue to review an order of the Circuit Court of Appeals, for the Second Circuit, modifying by a unanimous court and remanding to the referee for further proceedings not inconsistent with the opinion of the Circuit Court, an order of the United States District Court, for the Southern District of New York, remanding the proceedings to the referee.

Opinions Below.

The opinion of the District Court (R., fols. 652-671) is reported in 33 F. Supp. 171. The opinion of the Circuit Court of Appeals (R., pp. 255-266) is reported in 117 F. (2d) 216. The opinion of the Circuit Court of Appeals was written by Judge Charles E. Clark.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 3rd day of February, 1941 (R., pp. 273-4). The jurisdiction of this court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA §347).

Questions Presented.

The questions presented are:

(1) Whether the lower court has properly determined the functions of the official committee provided for (§338) in an Arrangement proceeding initiated under Chapter XI of the United States Bankruptcy Act, as amended (said official creditors' committee is sometimes referred to in this petition and the accompanying memorandum as the Statutory Committee); and

(2) The extent to, and the kind of services for which agents appointed by such a Statutory Committee may be compensated in the Arrangement proceeding.

Statutes and General Orders Involved.

The statute involved is that portion of the United States Bankruptcy Act relating to the appointment of the Statutory Committee (§338) and to the compensation of its agents (§337(2)).

Statement.

The debtor, Haytian Corporation of America, was a holding company, organized under the laws of the State of Delaware, which operated through a number of wholly owned subsidiaries (R., fol. 655). It con-

ducted the largest business in the Republic of Haiti and was engaged in the production of sugar and by-products, such as rum, molasses and alcohol (R., fol. 655).

A bond issue of some $3,000,000 of bonds, publicly held by a large number of bondholders, was coming due on December 31, 1938 (R., p. 258). Since the company could not pay the principal or accrued interest of approximately $2,200,000 some form of reorganized capital structure was necessary (R., p. 258).

For some years prior to the maturity date a committee consisting of Arnold R. Hanson, Sanford Griffith and Eliot E. Berkwit, known as the Hanson Committee, had been organized and had been in communication with the holders of the company's bonds and with the debtor with reference to the latter's affairs (R., fols. 23-4).

On October 14, 1938 the debtor filed its petition for relief under §322 of Chapter XI of the Bankruptcy Act (R., fol. 3). Shortly after the filing of the petition on October 27, 1938, a committee, known as the Wales Committee, was organized on behalf of bondholders (R., fols. 36-7). This committee represented substantial interests and consisted of Leonard A. Wales, Nathaniel H. Glidden, Walter F. Jarvis and Alexander H. McLanahan (R., fol. 37). The sum total of the Hanson and Wales Committees' representation of bondholders amounted to approximately $1,300,000 (R., fols. 10-11).

There were some differences of opinion as between these two informal committees (they are called informal committees to distinguish them from the Statutory Committee, which was subsequently appointed), during the early stages of the proceedings

as to the kind, character and nature of the securities which should be issued by the reorganized debtor. However, both committees had a common goal in that they were attempting to obtain for the bondholders of the company an interest commensurate with their position at the time.

Insofar as possible, the committees attempted to work together rather than at loggerheads and by prearrangement, at the first meeting of creditors, held pursuant to §334 of the Bankruptcy Act, a Statutory Committee was appointed pursuant to §338, consisting of Erle R. Lane, C. A. Richmond, F. A. Goddard and Ralph W. Thomas (R., fols. 10-11). Two of these individuals were suggested by the Hanson Committee and two by the Wales Committee but none of the members was a member of either of the informal committees.

The Statutory Committee adopted the following resolutions shortly after its appointment (R., fols. 12-16):

> "WHEREAS the Haytian Corporation of America Bondholders Committee composed of Leonard A. Wales, Nathaniel F. Glidden, Walter F. Jarvis and Alexander H. McLanahan and the Haytian Corporation of America Noteholders' Protective Committee composed of Arnold Hanson, Sanford Griffith and Eliot E. Berkwit, by virtue of the work heretofore performed by them which has been described to this Committee, are in a position to obtain from the holders of bonds of Haytian Corporation of America assents to the modified plan of arrangement which may be recommended by those committees and their adherence and co-operation will be of substantial value to

this creditors' committee in connection with the proceedings in which this creditors' committee was appointed, Now, Therefore, it is

RESOLVED that the Haytian Corporation of America Bondholders' Committee and the Haytian Corporation of America Noteholders' Protective Committee, be and they are each of them employed by this Committee as its agents for the purpose of continuing negotiations with the debtor, for the purpose of agreeing upon a final plan of arrangement for the debtor, and for the purpose of soliciting assents to such plan when agreed upon, and to take any other action or steps deemed necessary for the purpose of securing the approval of such plan by the bondholders.

* * * * * * * *

FURTHER RESOLVED that this Committee, subject to the approval of the Court, shall pay to the said Bondholders' and Noteholders' Committees and to the attorneys for this Committee their expenses and disbursements, as well as the reasonable value of the services rendered by each of them, including the value to this Committee of the adherence and co-operation of said Committees based on the work heretofore done by them."

The members of the Hanson Committee had performed substantial services prior to the appointment of the Statutory Committee, having been in the field for several years prior to the filing of the Arrangement proceeding (R., fol. 30). They were fully familiar with the history, method of operations, and manner of conducting the debtor's business. The background that had been acquired by the members

of the Hanson Committee through their prior participation would necessarily have had to have been acquired after the appointment of the Statutory Committee if the members of the Hanson Committee had entered the case for the first time at that point (R., fol. 30). The members of the Wales Committees similarly performed services prior to the appointment of the Statutory Committee, running over a period of about six weeks (R., fols. 36-9).

The members of the informal committees, in addition to the services performed prior to the appointment of the Statutory Committee, performed extensive services from on or about December 6, 1938 to November, 1939. These services are set forth in the Statutory Committee's petition and the supporting affidavits (R., fols. 8-102). As a result, in large measure, of the services rendered by the individual members of the Hanson and Wales Committees acting on behalf of the Statutory Committee during the period of about a year, a Second Modified Arrangement was formulated, submitted to creditors by the debtor and the necessary assents obtained to permit its confirmation (R., fols. 16-7, 30-1, 52).

On November 15, 1939 an application for reimbursement of expenses and disbursements was filed by the Statutory Committee with the referee (R., fols. 8-21). (The members of the Statutory Committee did not seek compensation as such.) After hearings the referee handed down a decision denying in its entirety the application of the Statutory Committee for reimbursement of its expenses and disbursements (R., fols. 562-612).

Upon a petition to review to the District Court (R., fols. 613-20), the referee's order was reversed (R., fols. 652-678) and the proceeding was remanded to

the referee "to take further proof and to determine the reasonable value of the services rendered and disbursements incurred" (33 F. Supp. 171).

The debtor appealed as of right to the United States Circuit Court of Appeals, for the Second Circuit, which modified the order of the District Court and remanded the proceedings to the referee for further proceedings not inconsistent with its opinion (R., p. 266). The Circuit Court, in its opinion (117 F. 2d 216 at p. 221), limited

(1) the functions of the Statutory Committee in an Arrangement proceeding; and

(2) the items of service for which such Committees' agents could obtain compensation

to such an extent as to impair seriously the orderly administration of Arrangement proceedings.

Moreover, the lower court held further (p. 221) that even though services fall within the classifications of allowable services, they would not be compensable if rendered prior to the appointment of the Statutory Committee.

Specification of Errors to be Urged.

The court below erred

(1) in holding (pp. 220-1) that the functions of the Statutory Committee in an Arrangement proceeding correspond to those of the committee authorized in §44(b) of the Bankruptcy Act and that the allowable expenses of such Statutory Committee must be limited to those incurred by it in passing judgment

upon the Plan and in making that judgment known to the debtor and the creditors for appropriate action by him or them;

(2) in holding (p. 221) that the services of the Statutory Committee's agents in the active solicitation of assents to the proffered Plan would not justify any allowance; and

(3) in holding (p. 221) that expenses incurred prior to the Statutory Committee's appointment are not allowable "since they are designed to facilitate advance acceptance of the Plan rather than to aid impartial judgment upon it".

Reasons for Granting the Writ.

This case presents, for the first time, an important question vitally affecting the administration of that portion of the Bankruptcy Act dealing with Arrangements, Chapter XI, which has not been, but should be, settled by this court. The enactment of Chapter XI of the Bankruptcy Act has altered radically the administration of bankruptcy proceedings. Since the enactment of the Chandler Act and during the period from September 22, 1938 to March 21, 1941 there were 645 Arrangement proceedings as against 51 Reorganization proceedings filed in the Southern District of New York. It will be observed, therefore, that a very substantial proportion of bankruptcy administration in the largest district in this country is being had under Chapter XI of the Act. Chapters I to VII, governing what are sometimes referred to as bankruptcy liquidations, contain sections which give to the liquidation proceeding an adversary character. Thus, §44(a) provides for the election or appointment of a

trustee. §44(b) provides for the appointment of a creditors' committee. Provision is made for the employment of attorneys (General Order XLIV) and for their compensation (§§62(c), (d) and 64(a)1).

In reorganization proceedings under Chapter X provision is made for the mandatory appointment of trustees in larger cases (§156) or an examiner in cases where the debtor is continued in possession (§168). Moreover, even where no trustee or examiner is appointed the stimulus for an adversary proceeding is furnished in part by §242, which provides for the compensation of committees and representatives of creditors and stockholders and their attorneys or agents "in connection with the administration of an estate in reorganization or in connection with a Plan approved by the Judge, whether or not accepted or finally confirmed". Chapter X provides for the permissive or mandatory intervention of the Securities & Exchange Commission (§208).

Chapter XI is singularly lacking in comparable provisions. §338 provides that upon dismissal of an Arrangement proceeding "* * * the creditors * * * if a trustee has not previously been appointed, may nominate a trustee who shall *thereafter* be appointed by the court in case it shall become necessary to administer the estate in bankruptcy as provided under this chapter".

The trustee's office, therefore, does not come into being until it becomes necessary to administer the case in bankruptcy.

There are only two sections in Chapter XI which can possibly be interpreted so as to furnish the mechanism necessary for imparting to Arrangement

proceedings an adversary character. §338 further provides:

> "At such meeting the creditors may appoint a committee if none has previously been appointed under this Act * * *."

§337 provides:

> "At such meeting, or at any adjournment thereof, the judge or referee shall, after the acceptance of the arrangement——
>
> (2) fix a time within which the debtor shall deposit * * * the actual and necessary expenses incurred in connection with the proceedings and the Arrangement by the Committee of Creditors and the attorneys or agents of such Committee, in such amount as the court may allow."

The lower court has so interpreted these sections as to deprive Chapter XI of its adversary character. First, it has limited the functions of the committee to those functions as set forth in §44(b) of the Act. Secondly, it has limited the kind of service for which the committee's agents can be compensated to such an extent as to hinder and impede the effective functioning of the committee. As a practical matter, the limitation of compensation does not *per se* hinder and impede the functioning of the Committee but it needs no extended argument that if the Committee's agents cannot be paid to perform necessary services, such services as a practical matter will not be performed.

If Chapter XI is to continue as an effective medium for the adjustment of insolvent debtors' affairs, this court can and should define the functions of the Ar-

rangement committee sufficiently broadly so as to permit the Committee

(1) to take an active part in the proceeding with respect to problems of administration;

(2) to examine into the affairs of the debtor prior to the filing of the petition;

(3) to act as a control upon the debtor in the decision of its business problems during the proceeding;

(4) to negotiate with the debtor in connection with the Plan of arrangement which has been offered;

(5) to negotiate for the alteration or modification of the arrangement proposed consistent with the rights of creditors;

(6) to oppose a plan of arrangement which the committee regards as unsatisfactory; and

(7) to endeavor to consummate a Plan of arrangement which the Committee believes affords adequate protection for creditors, which would include the solicitation of assents.

This enumeration is not intended to be complete and should include any additional items that might arise during the course of the proceeding where the interests of the debtor and of the creditor body would come into conflict.

The power of the Statutory Committee, where not inconsistent with the language used by Congress in drafting the statute, must and should be defined and delineated in such manner as to enable Chapter XI

to continue as an effective medium for adjustment of insolvent debtors' affairs. This question is of such general importance that it should be settled by this court.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SYDNEY KRAUSE,
Counsel for Petitioners.